

The Law of Nature:

An Introduction to American Legal Philosophy*

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When the Pilgrim fathers landed at Plymouth on December 11, 1620, thoughts of legal philosophy were even more remote for them than was the Virginia coast for which they had embarked. No lawyer or philosopher was with them to be interested in such conjectures; and even if one had been there, the problems of existence which confronted these religious adventurers were much too direct and urgent to invite indulgence in such abstruse speculation. One of these problems concerned the power of their group to set up a government in New England rather than in Virginia, where they had been authorized to settle, and the Mayflower Compact, signed on November 11, 1620, was their substitute temporarily for articles of state. Further, none among them doubted that the way of life which they should lead in this new land was authoritatively prescribed in the Bible. As Englishmen migrating from Holland their cultural heritage was united. With such a culture and with these two documents—the Bible and the Compact—any philosopher could have assured them, had they been at all interested, that their experiment in government was well founded upon the doctrine of natural law. Even the New England coast to which they came furnished an adequate facsimile of a state of nature; and they could safely have left to their illustrious countrymen, Thomas Hobbes and later to John Locke, to dispute whether this virgin territory was one of war or of peace.

Any philosophy is explicit in its function, and the stage of culture which it serves determines the sophistication of its metaphysics—or even the denial. In the early days of New England there was no conflict in ideas regarding the purpose of man on earth or of human society. Hence there was also no conflict of philosophies to explain those ideas. The guide for morals, government, religion, in fact for

*Editor's Note. At the time of his untimely death on May 24, 1951, Professor Rose was engaged in writing a number of essays on Jurisprudence. The present paper was but one of the projected essays. He had made known to Mrs. Rose that he did not consider this paper ready for publication and that it was not his intention to publish it separately in any event. Undoubtedly, he was contemplating giving expression to his mature reflections upon the subject in later essays. This expository, introductory phase of his project is a very valuable contribution as such and the Journal is extremely gratified that Mrs. Rose has kindly consented to its publication in the current symposium. Mr. Rose had not put the documentation in final form. It has been considered wise not to take liberties with his notes.

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all being was one and undisputed. The ultimate source of all knowledge was assured. No erudition was needed to point out that the theology which these first settlers brought to New England sufficed also as a philosophy of law, or that legal philosophy like moral philosophy is revealed in the same authoritative text. Reason and nature may not have been among the subjects of early Puritan discussion, but natural-law philosophy need not be articulate to have been as much a part of colonial mores as was Christian theology. Knowledge of its history and the refinements of its doctrine were unessential to its existence or to the importance which it was to have in the development of American legal as well as political theory.

But this phenomenon, that the general philosophy of a time or place includes, though unidentified, its special application to the field of legal theory, is a commonplace of any legal philosophy. When one accepts the thesis that positive law with its legal institutions and rules is merely a function of a national milieu, it should not be startling that the philosophy upon which it is founded is only a special adaptation of the general philosophical theory which explains and justifies the existence of that society, its arts, its religion, its economic as well as its social institutions. As long as philosophers interested themselves in the examination of all knowledge, any other conception of legal theory was impossible. It has only been since philosophers have segmented their field of study that lawyers could look upon their own special facet of social control as the subject of a philosophy all its own. But the greater truth is essential to a more accurate understanding, for if law and legal institutions are to be comprehended in their fullest significance, they must be related to the social order out of which they spring and which in turn they serve. In this perspective legal philosophy as a branch of general philosophical doctrine is more readily ascertained, and movements which are ascribed to politics, to literature and art, to economics or sociology will be found to affect schools of legal theory too. For early colonial America the task of equating natural-law theory to the scheme of daily life is rendered relatively easy because of the purity of its doctrine, its kinship to the religion and to the centuries of its development. But a proper understanding of its importance as well as of its applicability to the creation of an American legal order requires a survey of its origin, its growth and of the various and even divergent doctrines that have been proclaimed in its name.

HISTORIC ROOTS

Natural-law philosophy is the oldest American theory of law as it is also the oldest in western European legal culture. Like so many

other intriguing ideas its origins are in ancient Greece. Law in Athens was both legislative and customary.¹ There were codifiers like Draco and Solon, and Lycurgus of Sparta legalized the stark military standards of the Laconian state. In the Greek mind as well as experience law and legal institutions were associated with political power or with customary behavior. They were not ordinarily identified with the rational or the ideal. It was speculation by Greek philosophers on the essence of reality and of virtue which led in time to consideration of law's ontology and of the relation between human law and the universal law of nature.

The Greeks had long accepted the theory of an ordered universe regulated by cosmic laws. Heraclitus (c. 536-470 B.C.) believed that man as a part of nature shares in the eternal order of things, which emanates from the eternal reason or *logos*. It was from this conception of reason and order that Greek philosophers developed a law of nature. Socrates in the *Dialogue*, *Meno*, found in knowledge the measure of virtue. Plato in his *Minos* of disputed origin described law as tending toward the discovery of reality, that is, discovery of the ideal form of perfect law. His Socrates says that "Whoever fails to attain reality, fails to attain accepted law." According to Aristotle man is a political animal endowed with a social instinct. Among all other animals he alone possesses any sense of good and evil, or of the just and unjust. Also because of his power of speech it is intended that man shall set forth these distinctions.²

Political justice, Aristotle said, may be conventional or it may be natural. If in the first instance justice may be settled one way or the other indifferently, it is conventional. If it has the same validity everywhere and does not depend upon whether or not it is accepted, it is natural.³ While Aristotle recognized that in the trial of cases these philosophical reminations could not displace the written law, as an orator he taught that when the letter of the law is against the pleader, he should insist upon the greater equity and justice of the universal law.⁴ As opposed to the rule of man, the rule of law was said to be that of God and reason; for "law is reason unaffected by desire."⁵ These were the humble origins from which later was to spring the Grecian doctrine of a universal natural law.

During the period of the Greek city state there was no need for a full blown philosophy of universal law. Each city was an autonomous governmental unit. Explanation of divergent views or of

1 CALHOUN, GREEK LEGAL SCIENCE ch. IV; BONNER, LAWYERS AND LITIGANTS IN ANCIENT ATHENS 98.

2 ARISTOTLE, POLITICS (Jowett trans.) 1 and 2; WORKS, (Ross ed.) vol. 10.

3 ARISTOTLE, NICOMACHEAN ETHICS (Rackham trans.) 5 and 6.

4 ARISTOTLE, RHETERIC (Roberts trans.) 1 and 15; WORKS, *supra* vol. 11.

5 ARISTOTLE, POLITICS, *supra* III, 16.

similarities in legal orders was not required. This was the case until the conquests of Alexander forged a Macedonian empire and brought into a single system of government a motley of alien races and of foreign laws and customs. The cosmopolitanism which ensued created a need for a legal order vastly extended if not, at least in theory, universal. This requirement the Stoics supplied with their doctrine of a universal natural law. In so doing they laid the foundation not only for a theory of law in the subsequent Roman system, but still later for Christian legal doctrine and so for a European and American philosophy of law. Building partly on Heraclitus, Zeno and the school which he founded created an elaborate pantheism, a natural religion in which reason became the law of the universe and of man. Ordained by reason and by reason's god, virtue reigned as universal law, binding upon individual reason, in recognition of which human law came into existence. Justice, hence, is an attribute of nature and is not solely a convention. The world emanates from God which he rules by his law. "Nor did I deem," replied Antigone to Creon, the king,

Thy edicts strong enough,
Coming from mortal man, to set at naught
The written laws of God that know not change.
They live for ever, nor can man assign
Whence first they sprang to being.

Centuries later the supremacy of God's over human law was similarly to be recorded in the Acts of the Apostles: "Then Peter and the other apostles answered and said, 'We ought to obey God rather than men.'" When law becomes religion, governments may not transcend the infinite. Their duty is to follow where law leads; or, if to lead, then only within the limits of eternal verities. "Man, fearfully made, is the workmanship of his all-perfect Creator: a state, useful and valuable as the contrivance is, is the inferior contrivance of man, and from his native dignity derives all its acquired importance." From Antigone, through Peter the apostle to Justice Wilson in *Chisholm's Executor v. Georgia*,⁶ extend some twenty centuries of religious thought, partly pagan, largely Christian. It is the law of nature which unites their theory of justice and which coordinates their views regarding the relationship of man to God and to the state.

The ancient stoic doctrine was one of respect for law and order, a frequent concomitant of natural law theory. But also imminent in any system of higher law inherent in the nature of things is a theory of rights of man natural to his being, which he may assert in his own interest in opposition to man-made law. Cosmopolitanism sees every man as his brother, possessed of equal rights not to be denied by the

⁶ 2 Dall. 419, 454 (U.S. 1793).

sheer power of a conqueror's reign. It is a militant doctrine of rights as distinguished from law, of individual privilege as opposed to governmental power. This tack was taken by the Greek school of Sophists, who inveighed against the tyranny of human convention. "God," said Alcidas, "made all men free; nature has made no man a slave." While at Rome on an embassy from Athens, Carneades, the Sceptic, went further and attacked the whole stoic conception of natural law and an ethical content of nature. Natural law, he claimed, has no factual connection with the realities of life. Laws have no sanction in nature. They are obeyed only because of the threat of penalty. Nature teaches all living creatures to consult their own self-interest. Rulers are tyrants, though they call themselves citizens. Nor are men just by nature. Hence weakness and not nature is the mother of justice. Out of mutual fear of one citizen for another and of one class for another arises a contract which is the true foundation of the state.⁷

These early reactions to the placidity of stoic obedience to law were the fore-runners of a subsequent theory of natural rights, of utility as a test for the good life, and of modern legal positivism. "Man is born free," said Rousseau, "and everywhere he is in chains."⁸ His rights are proclaimed in declarations, are incorporated into constitutions and are proposed in international conventions. In terms of power, prophecy substitutes for reason as a definition of law, and political force replaces subsumption as a description of the judicial process. "In these sibylline leaves," wrote Justice Holmes, referring to Anglo-American law reports, treatises and statutes, "are gathered the scattered prophecies of the past upon the cases in which the axe will fall."⁹ The words are modern but the origin is ancient. Whether one proclaims a doctrine of obedience to law, or the subservience of human to natural law, or vice versa of man against the state, or of law in terms of political might, his thesis is both as modern as a court decision and as ancient as the classics.

The decline of the Greek world and the rise of the Roman Empire found added scope for a cosmopolitan philosophy of law. For this need, stoic theory, migrating westward, offered a ready and neat solution. During several centuries Hellenized stoic culture was the creed of educated and influential Romans. Taught by philosophers, such as Panaetius (c. 180 - 108 B.C.), Posidonius (c. 130 - 50 B.C.) and the Greek slave Epictetus (c. 60 A.D.), it included among its disciples Seneca (c. 3 B.C. - 65 A.D.), praetor and consul, Emperor Marcus Aurelius (121 - 180) and the three praetorian prefects, Papinian, Paul and Ulpian, whose opinions, controlling throughout the

⁷ CICERO, *ON THE COMMONWEALTH* (Sabine and Smith trans.) 26 ff and 200 ff.

⁸ ROUSSEAU, *THE SOCIAL CONTRACT* 1.

⁹ HOLMES, *COLLECTED LEGAL PAPERS*, ———.

empire, would be comparable in philosophical importance to those of Justices Wilson, Story and Chief Justice Marshall of our own Supreme Court, whose predilections for natural law are equally well known. "The greatest of the jurists," writes Dunning,¹⁰ "were of Stoic tendencies, and hence we find at the basis of their work the characteristic doctrines of the Stoic philosophy. Dealing as they were with the practical affairs of the whole civilized world, the conception of a universal law and of the brotherhood of man took on a character of concreteness that it wholly lacked in the days of the early Stoics and even of Cicero."

But it was Cicero (106 - 43 B.C.) primarily who introduced stoic legal theory into Roman juridical doctrine. For Cicero natural law has divine origin. It is universal and dominant over man-made law. It is "the highest reason implanted in Nature, which commands what ought to be done and forbids the opposite."¹¹ It is synonymous with right reason, unchangeable and eternal. Human legislation may not properly restrict its operation and cannot wholly annul it; nor can the people or the senate absolve anyone of his obligation to obey it. It is the same at Rome as it is at Athens. There is in fact "one law, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were one common master and ruler of men, namely God, who is the author of this law, its interpreter, and its sponsor."¹²

So striking a statement of the evolution of early Grecian unity of nature and the divinity of law is more easily understood when it is recalled that the Romans developed two bodies of positive law. One of these, the *ius civile*, was applicable only to Roman citizens. The other, *ius gentium*, created through the edict of the perigrin praetor, was a body of rules, partly Roman, partly foreign,¹³ published and administered by him in controversies arising between non-citizens, or between citizens and non-citizens. Among philosophers, however, *ius gentium* had the broader meaning of a philosophical, legal system composed partially of comparative jurisprudence, and partially of rational speculation,¹⁴ with a universality probably more prophetic than actual. Gaius, who wrote during the middle of the second century, stressed the philosophical unity of *ius gentium* and natural law by defining *ius gentium* as a law generally accepted by mankind because of its natural reasonableness.¹⁵ Ulpian at the close of the century dis-

¹⁰ DUNNING, POLITICAL THEORIES, ANCIENT AND MEDIAEVAL 127.

¹¹ CICERO, DE LEGIBUS, ——— Bk. I, VI.

¹² CICERO, ON THE COMMONWEALTH, *supra* note 7, Bk. III, XXII.

¹³ MUIRHEAD, AN OUTLINE OF ROMAN LAW 16 (2nd ed.); MAINE, ANCIENT LAW (Pollock ed.) ch. iii, pp. 52 ff.

¹⁴ MUIRHEAD, ROMAN LAW 226 (2nd ed.).

¹⁵ MUIRHEAD, THE INSTITUTES OF GAIUS AND RULES OF ULPIAN i,i; NUSSEBAUM, A CONCISE HISTORY OF THE LAWS OF NATIONS 18-22.

tinguished *ius gentium* from *ius naturale*. The latter, he said, was taught by nature to all animals, while the former was used by the various tribes of mankind.¹⁶ Carlyle, discussing the writing of Cicero and Seneca, sees in this distinction a vague recognition among Romans of the differences between natural law in the primordial Golden Age and that which developed as *ius gentium* after the institution of civil society: a doctrine familiar to the Church Fathers and to publicists of a later date.¹⁷ The extension in 212 A.D. of citizenship throughout the empire brought *ius civile* and *ius gentium* into a single universal system of Roman law.¹⁸

In addition to their *ius gentium* as opposed to the *ius civile*, the Romans also distinguished between *ius*, which was traditional law containing ideas of right and justice, connoting the ideal or divine, and *lex* in the stricter sense of legislation.¹⁹ The broader scope of *ius* which included "all circumstances fair and right, as in the case of natural law,"²⁰ enabled jurists to rely upon reason and innate conviction of right in the development of both *ius civile* and *ius gentium*. Slavery, legal under the *ius gentium*, was prohibited by *ius naturale*, for by the latter all men are born free,²¹ a tenet of the rights of man ordained by nature,²² which is made explicit in the Declaration of Independence.

The fall of the Roman Empire in the west and the period of intellectual decadence which followed, carried with them a similar decline in knowledge and influence of Roman law. Toward the end of the eleventh century, however, the revitalized interest in jurisprudence at Bologna and elsewhere revived the study of Roman law with its infiltrated doctrine of stoic natural law. It was the work of these medieval law schools, aided by the development of canon law in the Roman Catholic church, that was mainly responsible for the general European reception of Roman law. With the Roman system thus firmly established,²³ the influence in Europe of the Stoa and its doctrine of natural law was secured.

Modern American law owes several debts of ancestral lineage to Cicero's ideal law of reason. First is the development of equity as "right reason" in order to mitigate injustices which would result from too rigorous an application of sheer legal rules. Another is the body

¹⁶ JUSTINIAN'S INSTITUTES (Sandars trans.) 1,2,1; JUSTINIAN, THE DIGEST (Monro trans.) 1,1.

¹⁷ 1 CARLYLE, A HISTORY OF MEDIAEVAL POLITICAL THEORY IN THE WEST 38 and 42-44.

¹⁸ SOHM'S INSTITUTES OF ROMAN LAW (Ledlie) 46 and 47 (3rd ed.).

¹⁹ *Id.* at 116 ff; MUIRHEAD, *supra* at 1, §7; SALMOND'S JURISPRUDENCE 517-521 (7th ed.).

²⁰ DIGEST, *supra*, PAULUS, 1,1,11.

²¹ INSTITUTES, *supra*, 1,2,2; DIGEST, *supra*, 1,1,4; CARLYLE, *supra* at 40.

²² DUNNING, *supra* at 122 and 123.

²³ MUIRHEAD, *supra* at 26-32.

of international law which, though in modern dress is composed largely of convention and custom, had its origin in the reason of natural law and in the *ius gentium* of Rome. A third arose during the expanding period of American law, when judges adopting English rules to new environments, and regarding reason as well as custom as the constituent elements of the common law, could consequently rely not only upon their own training in legal reason for sources of new doctrine, but could borrow freely from the civil law writers examples of universal doctrine and reason. More recently modern legal writers and judges, reacting against the rigid, syllogistic reasoning of common-law judges, are recognizing anew the debt which legal rules owe to the moral standards of the society which it is their duty to reflect as well as to govern.

CHRISTIAN DOCTRINE

Stoic legal theory, as it progressed from the so-called middle Stoa at Athens, through the westernized eclectic stoicism at Rome exemplified in the writings of Cicero, led directly to the formulation of Christian legal doctrine. Each attributed divine origin to the reign of law among men. Law derived from a god-head is of ancient origin, and when kingship is joined with priesthood, the combination lends supernatural sanction to the power of government. This device of bolstering mundane rule with divine sanction was illustrated about 2250 B. C. in ancient Babylon where the bas-relief of a black diorite monolith on which his code is engraved, portrays King Hammurabi receiving the laws from the Sun God. Similarly Moses was instructed by Yahweh and the sum of these revelations, preserved in the Torah, the first five books of Moses, unites the law and theology of orthodox Jews. Mohammedan and Hindu law lay claim to sacred origin; and in a more recent era Joseph Smith credited divine revelation to the Book of Mormon.

But Christianity has closer ties with stoicism than a similarity in a law-giving deity. It was the goal of Christ's disciples to proselyte the hellenized Roman world. To accomplish this challenge there was need for a religion whose metaphysics also offered a satisfactory cosmology. This feature of Christianity was supplied through stoic influence on the gospels as evidenced in the prologue to the Book of John, where the First Cause or beginning is described in the Greek ontological agency of the Word, or *logos*—an exegesis later amplified by Origen (c. 185 - c. 254). Further, in Paul's epistle to the Romans, ii, 12 - 14, it is recognized that although the Gentiles do not have the sacred law of the Jews, yet "when they do by nature the things contained in the Law," they too act according to law. When under Con-

stantine in 325 A. D. Christianity became the state religion of the Roman Empire, centuries of stoic philosophy furnished the background for accepting its doctrine of a law of nature emanating from God, even to including the perfection of its law in Eden before worldly wisdom newly acquired by the first man and woman caused their perpetual banishment from that unique and perfect state of nature.

In their writings the Church Fathers brought the spirit of Plato, Aristotle, Ulpian, Seneca and Cicero into the Christian version of civil and canon law. Origen, just referred to, Saint Ambrose (c. 340 - 397), Saint Jerome (340 - 420), Saint Augustine (354 - 430), Pope Gregory the Great (c. 540 - 604), Isadore of Seville (c. 560 - 636), the Decretum Gratianus on canon law (c. 1148) and the canonical Decretal of Gregory IX (1234) assured their hellenization.

But it was Saint Thomas Aquinas (c. 1227 - 1274), building upon Aristotle, whose Summa Theologia crystallized the philosophical content of Roman Catholic theology, and whose theory of law is today having a neo-Thomist revival in Catholic law schools. Saint Thomas predicated law upon a combination of two elements, reason and will. Law is reason. Hence the will of the sovereign has the force of law only when it is in accord with some rule of reason. Law "is nothing else than an ordinance of reason for the common good, made by him who has the care of the community, and promulgated."²⁴ In this sense, also, the volition of God flows from His divine reason. Since the universe is governed by divine reason, the very idea of His government has the nature of law; and since divine reason is timeless, His law is eternal. Thus law becomes religion and religion becomes law. The philosophy of the one is the philosophy of the other.

In addition to the *lex aeterna* which exists in God's mind, there is the divine law of God which is revealed in the Bible, which forms Saint Thomas' second category of law. Further, man participates in God's eternal law through use of his reason, but because human reason is fallible, he does so imperfectly. And since animals are not rational creatures, they do not share in this eternal law save "by way of similitude." Natural law, then, the third category, embraces those things to which man is inclined naturally. It is uniform in its general principles, but may vary according to circumstances in their application. Laws framed by man, that is, positive law, constitutes Saint Thomas' fourth classification. In so far as laws are just, being derived from natural or ultimately from eternal law, they are binding upon the conscience. In so far as they deflect from natural law they are but perversions of law. If they are unjust, because they are not conducive to the common good, are improper as to authority or form,

²⁴ THE SUMMA THEOLOGICA (The Fathers of the English Dominican Province trans.) 8.

or are opposed to divine law, they "must nowise be observed," for the Apostle Peter has warned us that we "ought to obey God, rather than man."²⁵

Saint Thomas' discussion of natural law is notable in two respects. First, it is the vehicle through which Greek and Roman legal philosophy is converted into Catholic dogma and preserved authoritatively for us today. Second, in Greek philosophy law was associated with reason and was impersonal. At Rome, through the agency of the senate, the praetor, iudex and the responsa of opinions of jurists,²⁶ this impersonal, philosophical reasoning of the Greeks became part of a positive system of authoritative imperial law;²⁷ or, according to Dunning, law became "either a conclusion of reason or an expression of will."²⁸ Saint Thomas combined reason and will in his definition of law, both with reference to the law of God and of man.²⁹ It is a contribution to the definition of law which has never lost its significance.

These distinctions are interesting in the transition of law in legal theory from being in essence reason divine or secular to becoming a sovereign's command as we find it in Austin's definition and in the eventual positivism of modern legal thought. Within the Church the Franciscan, Duns Scotus (c. 1265-1308) completed the transition. In accordance with Aristotelian tradition Saint Thomas believed that the will is dependent upon the intellect and knowledge of the good. Duns Scotus on the contrary separated will from intellect and made it supreme. God's will becomes His volition as distinguished from His intelligence. This difference paves the way for Hobbes and the course of positivism against which modern scholasticism vigorously contends.³⁰

Another English Franciscan, William of Occam (d. c. 1345) has been criticised for furthering the theory of Duns Scotus, that will rather than reason is the dominant characteristic of natural moral law.³¹ He distinguished three classes of natural law. The divine law, says Occam, is revealed in the old and new testaments. Natural law, on the contrary, is not revealed, but is implanted by God in men's hearts. First there is natural law which conforms to natural reason

²⁵ ACTS 5 and 29. Cf. ANTIGONE, *supra* at ———; SUMMA THEOLOGICA, *supra*, 2,1, ——— 90-94.

²⁶ BUCKLAND, A TEXTBOOK OF ROMAN LAW 22ff.

²⁷ JUSTINIAN'S INSTITUTES, *supra*, 1,2,6.

²⁸ "Quod principii placuit, legis habet vigorem." ULPIAN, DIGEST, *supra*, 1, IV, 1.

²⁹ DUNNING, *supra* at 192.

³⁰ Anton-Herman Chroust, *Hugo Grotius and the Scholastic Natural Law Tradition*, 17 THE NEW SCHOLASTICISM 101-112.

³¹ ROMMEN, THE NATURAL LAW 58 ff; cf. Shepherd, *William of Occam and the Higher Law*, 26 AM. POL. SC. REV. 1005.

and which cannot fail. Next is a natural law which exists only in an ideal sense, and which consists of natural equity. This second division of Occam's natural law corresponds to the mutable portion of Aquinas'. Then there is a natural law in a third sense, which Occam derives from his second category of pure natural law, and which is found in *ius gentium* or any human act. That is, this third class consists of those portions of the *ius gentium* or of human acts which are ascertainable by evident reason.³²

The significance of medieval preoccupation with natural law theory is not purely theological. Positive law during the Middle Ages was either custom or was derived from Roman civil law. There was little constructive legislation. Government was admittedly subservient to law, and all mundane power whether sacred or profane ultimately came from God. Consequently, the sources and objectives of law as they related to government were of fundamental importance. Since philosophy was predominantly scholastic, the views of the schoolmen on the relation of church and state and on popular sovereignty were practical and highly significant. The dependence of modern democracy upon legislation to implement its objectives may obscure for us the dominance of speculative theory in a former age. Climates of philosophical opinion which then were realities may appear naive to a subsequent people whose theories in turn have the appearance of a new enlightenment.

The independent existence of law and the legal foundation of the state with a mission to realize the ideals of law were once basic assumptions. So were the distinctions which were drawn between the divinely revealed laws of God, the mutable laws of nature, and a *ius gentium* necessitated by the fall of man, derived partially from natural law and partially from rules actually in use among nations. While the state was considered to be above the rules of positive law it was subject to natural law. Positive law or *ius civile* it could modify but it could not abrogate *ius naturale*. Herein lay the reconciliation of an otherwise irreconcilable conflict. Without it or a theory of social contract the prince stood above all law. This reasoning is the more persuasive when one postulates a final cause for which man was created and a secular rule resulting from his fall. When government neglects to embody in a constitution, written or unwritten, its basic assumptions regarding the relation of man to the state, human rights and the natural law theory upon which they rely are not matters of ideal speculation. Before the enactment of the Fourteenth Amendment as the positive law of the federal constitution, the doctrine of natural rights had an undisputed reality in American politics and American law courts, too.

³² SHEPHERD, *id.* at 1008-1013; Pollock, *The History of the Law of Nature: A Preliminary Study*, 1 COL. L. REV. 11, 15 (1901).

Thomas Aquinas perfected Church, natural law doctrine. Natural law, derived from Divine law, is the source of the *ius civile* as well as of the *ius gentium*. The City of God and the City of Man are united through a common legal heritage. The precedent of pagan Rome becomes Christian orthodoxy. Jurisprudence emanates from theology as does all philosophy, and the rights of man are a religious heritage. Protestantism and the rise of nationalism in Europe were bound to affect the simplicity of this reasoning. As men's minds turned toward the objectivism of science and as empiricism replaced metaphysics as a basis for research, rationalism and humanism evolved their conceptions of nature and its laws in derogation of Roman Catholic orthodoxy, culminating during the eighteenth century in the political theories of the Age of Reason. Hugo Grotius (1583-1645), Dutch publicist and statesman, was the pioneer of the modern era. He will be discussed later in connection with the development of international law. First, though, it is desirable to consider the state of nature out of which in theory arose civil society.

THE EVOLUTION OF CIVIL SOCIETY

Political theory of the Renaissance as well as of the Middle Ages accepted the doctrine of a primordial existence of man in a state of nature before the development of civil government. There was disagreement as to whether primitive man lived in comparative peace with his neighbors or was harassed by an eternal striving for existence, typified by a condition of war; just as there was disagreement as to whether the standard of ethical conduct set for him in nature constituted law in an acceptable legal sense, or amounted to no more than the prescript of religion or of the moral standards dictated by his reason. While Christian doctrine regarded the Garden of Eden as a historical fact, an original natural state of man was for some only an assumption, the proof of which was unnecessary to establish. In either event, from the hypothesis of a natural state, publicists evolved the civil state via a divine mandate, an original contract or a sense of social necessity.³³ Rationalization solved the dilemma of ending with absolute or popular sovereignty, according to the political views of the writer. Implicit in the state of nature was a doctrine of natural rights of man, whose survival in a civil state and for democratic government depended upon the thesis to be served. We start with the Englishman, Thomas Hobbes (1588-1679), well after the contract theory had become ascendant.

In 1651 Hobbes published his *Leviathan*. It was a political tract

33 1 GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY* (Barker trans.) 37.

written during the Puritan Revolution in support of absolute sovereignty. He used the standard formula of a state of nature whose existence, however, he did not attempt to prove. Man's innate drive for power, his feeling of insecurity and his desire for glory result in a constant striving among equals and a "bellum omnes contra omnes."³⁴ In this natural state of war among all men in which each man must defend himself, there is no distinction between right and wrong or between justice and injustice. Lacking a common ruler there is no law, and without law there is no justice.³⁵ Law, by Hobbes' definition requires civil government. It consists in the commands of a sovereign.³⁶ In the natural state justice and gratitude, being simply dictates of reason concerning matters of equity, are merely rules of natural law. They do not properly become laws in any accepted sense until they are adopted into the legal order of an organized state. Thereupon they and the civil law become branches of the same legal system, civil law constituting the written and natural law the unwritten part.³⁷

In the war-like state of nature, Hobbes wrote, reason urges men to adopt articles of peace. Precepts of nature in derogation of natural liberty, he termed laws of nature. First among these is that men should seek peace. Second is that for the sake of peace one should be willing to forego his liberty or right to all things which was his birthright in nature, and to accept such curtailment of his liberty toward others as they in turn accept regarding him. A third law is that men shall perform their covenants.³⁸

From this condition of nature and of natural law a commonwealth arises, according to Hobbes, when a multitude of men, in order to escape from the anarchy of nature, covenant among themselves to forsake their natural liberty in favor of a sovereign, who will protect them and furnish them with an opportunity in peace to pursue the means of commodious living.³⁹ For the unrestrained license in nature men substitute the perilous security of the civil state. In return for this protection the sovereign whom they choose becomes the legislator. Since the people in creating their civil society, by their majority vote⁴⁰ authorize their chosen monarch to act for them, it follows that he, who is not a party to the contract, is above the law, nor may they complain of injury or injustices from him.⁴¹ But since

³⁴ LEVIATHAN (ed. by Oakeshott) 64 and 82.

³⁵ *Id.* at 83 and 84.

³⁶ *Id.* at 173 and 179.

³⁷ *Id.* at 104, 174, and 186.

³⁸ *Id.* at 84, 85 and 93.

³⁹ *Id.* at 84 and 113.

⁴⁰ *Id.* at 113.

⁴¹ *Id.* at 173. For the distinction between a contract of society and a contract of government see GIERKE, *supra* at 60 and *infra* PUFENDORF at ———.

there now is a force within organized society for the enforcement of rights, the refusal of a person to perform his covenants becomes an injury or injustice, where before, in the state of nature, it was at most a breach of a natural law moral duty. For injury of injustice to exist in law there must be some coercive power to compel men through the terror of punishment to perform their covenants.⁴²

Hobbes' doctrine of absolute sovereignty, based upon the fiction of a social compact, is a foremost statement of the power concept of government. For him the function of civil government is to furnish and enforce the rules of life's contest. It is not to effect the end of natural law as seen by the theologians, nor to make men virtuous as Plato believed.⁴³ Law becomes the force of organized society — a tenet with which Justice Holmes agreed.⁴⁴ Since the sovereign is not bound by the contract which brings the state into being, he is subject to no public law; and since civil governments themselves exist only in an unorganized natural state, there is no super-legislature to command order among nations.⁴⁵ Hobbes' positive theory of law foreshadows much that is contained in analytical jurisprudence. But his denial of a legal essence to natural law or to man's rights in nature is contrary to the belief of most theologians; and his basic assumption of man's egocentric spirit of self-interest is scarcely compatible with Christian ethics. In short, Hobbes' civil state is a utilitarian organization of society founded upon an Epicurean doctrine of self-interest and self-preservation:⁴⁶ a humanist conception of absolute government rationally conceived, as distinguished from a metaphysical one of divine right of kings.⁴⁷ It was to be expected that the Leviathan would meet with criticism as well as with praise.

But as civil society may spawn from a natural state of war through the logical device of a social compact by which men surrender their freedom in nature for the uncertain protection of an absolute sovereign, so it may emerge by way of the family from a dissimilar natural state of peace. In refutation of the Leviathan, Richard Cumberland (1631-1718), bishop of Peterborough, published in 1672 *A Philosophical Inquiry into the Laws of Nature*.⁴⁸ All moral and civil knowledge, he said, is founded upon natural law. These laws may be proved inductively, which was the method used by Grotius, or deductively from cause to effect, which was Cumberland's

⁴² LEVIATHAN, *supra* note 34, at 94.

⁴³ DUNNING, *supra* at 276-281; HOLDSWORTH, *supra* vol. 6, 294-301.

⁴⁴ Holmes, *Path of the Law* in COLLECTED LEGAL PAPERS 167.

⁴⁵ HOBBS, *supra* at 85; GIERKE, *supra* at 97.

⁴⁶ PUFENDORF, THE LAW OF NATURE AND OF NATIONS (Kennett trans. 4th ed.), A HISTORICAL AND CRITICAL ACCOUNT OF THE SCIENCE OF MORALITY, by BABEYRAC 80.

⁴⁷ BRINTON, IDEAS AND MEN 354 and 355.

⁴⁸ Contained in A TREATISE OF THE LAWS OF NATURE (Maxwell trans. 1727).

preference.⁴⁹ Rejecting Plato's theory of innate ideas, he reasoned that the First Cause in the nature of things imprints certain practical propositions upon our minds. These propositions, which are eternally true, carry with them rewards and punishments for their obedience or neglect. Knowledge and observance of them contribute to the natural perfection and happiness of our rational nature. Since, then, laws are "nothing but practical propositions, with Rewards and Punishments annex'd, promulg'd by competent authority," it follows that the laws of nature satisfy this threefold requirement of true law; they emanate from a law-giver, that is from God, are sanctioned by rewards and punishments, and are promulgated⁵⁰ by impression upon our minds. As true law, they exist without the necessity of a civil society.

All the laws and the prophets, Cumberland wrote, rest upon the first two commandments of the Bible: to love God with all thy heart, and thy neighbor as thyself.⁵¹ The general laws of nature can be reduced to one universal one: "The endeavour to the utmost of our power, of promoting the common Good of the Whole System of rational Agents, conduces, as far as in us lies, to the good of every Part, in which our own Happiness, as that of a Part, is contained. But contrary Actions produce contrary effects, and consequently our own Misery, among that of others."⁵² This was Cumberland's utilitarian doctrine of benevolence or universal love, natural to man and revealed through his religion, the antithesis of Hobbes' theory of egoism, upon which he based his political theories.

These laws of nature, said Cumberland, enjoin justice for all, defined by Justinian as the giving to every man his due.⁵³ For their enforcement not only by rules but by punishment, reason dictates the formation of civil government with sovereign power.⁵⁴ The end of government is, therefore, its cause, that is, the creation of an instrumentality "to enforce Observance of the Laws of Nature, to the Honour of God, and the Happiness of Mankind, but especially of those, who are Members of such Societies."⁵⁵ And that the common good may be preserved, it is the nature of things ordained by the First Cause, that property be distributed and protected; for there is "given a natural Law to procure the Common Happiness of all."⁵⁶ Hence the rights of subjects as well as of monarchs flow from the

⁴⁹ *Id.* at 10.

⁵⁰ *Id.* at 14.

⁵¹ *Id.* title page to A PHILOSOPHYCAL INQUIRY.

⁵² *Id.* at 16 and 56.

⁵³ *Id.* at 19 and 21.

⁵⁴ *Id.* at 348.

⁵⁵ *Id.* at 348 and 349.

⁵⁶ *Id.* at 68 and 315.

same command of nature to distribute property and protect it in the common good.⁵⁷

Mankind, according to Cumberland, is descended from one man and one woman, and from this original parental authority emerge nations and civil institutions.⁵⁸ Government, thus, arose out of the family and not out of a social compact.⁵⁹ Its objectives are limited as well as formed by the laws of nature,⁶⁰ which are stated in the Decalogue. Beyond the few and evident requirements, necessary for procuring these purposes of government, nothing is prohibited the supreme power. But since civil government arose as a dictate of reason and a law of nature, it owes its origin to God. Hence its limits are prescribed only by Him. But while nature circumscribes the prince's posser, it does not follow that subjects may punish their ruler for transgressing his authority. Punishment is the prerogative of God, whose laws are broken, and this privilege He has not delegated to man. Yet in constituting the supreme power of government the people may reserve to themselves the right to resist a supreme magistrate who openly flouts the purposes of government.⁶¹ Thus the king rules under God, but if he rules unjustly according to the ends of government prescribed by God, his subjects may revolt. In this manner Cumberland reconciled the authority of the prince with the will of God toward men, and refuted the unlimited positivism of Hobbes' social contract.⁶²

More important to seventeenth and eighteenth century America than the views of Thomas Hobbes and Bishop Cumberland on the state of nature and the civil state which emerges from it, were the political theories of John Locke (1632-1704). These he developed in his *Two Treatises on Government* (1690).⁶³ In his first essay Locke attacked the doctrine of divine right of kings as developed by Sir Robert Filmer (d. 1653) in an essay entitled *Patriarcha*, published in 1680. This right, according to Filmer, God conferred upon Adam in Eden. Through Noah and the patriarchs it descended to the absolute governments of the world. In the second essay Locke set forth his own theories of constitutionally limited government and of natural rights.

Like his predecessors, Locke posited a natural state of man,

⁵⁷ *Id.* at 325.

⁵⁸ *Id.* at 307.

⁵⁹ *Id.* at 307, 350 and 371.

⁶⁰ *Id.* at 350.

⁶¹ *Id.* at 351 and n.

⁶² BRINTON, *supra* at 286-292.

⁶³ And see his *ESSAY CONCERNING HUMAN UNDERSTANDING*; HOLDSWORTH, *supra* vol. 6, at 276-290; BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* ch. 2.

which he may have considered to have been historically true.⁶⁴ In this state, illustrated by examples from America, men lived "together according to reason, without a common superior on earth with authority to judge between them."⁶⁵ Liberty and not license was the rule, since the natural state was subject to the rule of nature, that is of reason, which teaches that no one should injure another "in his life, health, liberty or possession."⁶⁶ Punishment for the infraction of this law of nature was the executive privilege of each of its inhabitants.⁶⁷

The defects of this natural state, Locke found to be the absence of known laws, of an indifferent judge, and of the power to enforce sentence. Because of these needs which organized society furnish, men are willing to forego their freedom in a natural state of peace.⁶⁸ Civil government results from an agreement among members of a natural state to abide by the determinations of their majority, and this agreement is binding not only upon them but upon all those who subsequently unite themselves under it.⁶⁹ But since men surrender their liberties in return for the better protection of their natural rights which organized society affords, it follows that those in power must rule according to established law;⁷⁰ and that while the person of the prince is inviolate, yet the people may resist an unlawful abuse of power.⁷¹

The chief end of government for Locke is the protection of property, which he defines broadly to include man's natural rights to "life, liberty and estate."⁷² Hence the purpose of legislation is to supply the defects which "made the state of nature so unsafe and uneasy."⁷³ While legislative power is supreme in civil society, even here men's actions must conform to nature's laws.⁷⁴ There can be no absolute power of government, nor may anyone be arbitrarily deprived of his property or be taxed without the consent of the people.⁷⁵

Locke considered legislative power to be fiduciary and accountable to the people, who may transcend it by use of force when there is a breach of trust by the sovereign.⁷⁶ He separated the executive function of government from and made it inferior to the legislative. Or-

64 FIRST TREATISE §§14 and 15.

65 SECOND TREATISE ON CIVIL GOVERNMENT §19.

66 *Id.* §6.

67 *Id.* §8.

68 *Id.* §§123-126.

69 *Id.* §§95-97 and 120.

70 *Id.* §§134 and 136.

71 *Id.* §§205-208.

72 *Id.* §§87, 123, and 135. DUNNING, *supra* at 349-353.

73 SECOND TREATISE ON CIVIL GOVERNMENT, *supra* §131.

74 *Id.* §135.

75 *Id.* §§138 and 140.

76 *Id.* §§149, 204, 206 and 208.

dinarily the executive is charged with the conduct of foreign affairs, termed "federative power."⁷⁷ In addition to executive power, the sovereign is vested with a royal prerogative to act in absence of the legislature.⁷⁸ This doctrine of inherent executive power in a sense forecasts the theory advanced by Theodore Roosevelt, who maintained that the President possesses his powers as custodian of the people, and that his executive power is "limited only by specific restrictions and prohibitions in the Constitution or imposed by Congress under its constitutional powers."⁷⁹ In 1951 the debate again waged between the President and the Congress over the extent of the presidential powers.

The institution of private property Locke founded in nature. Hence it precedes civil society. God, he believed, gave the world to men in common, but enjoined them to labor in order to exist, intending the earth and the fruits of it for "use of the industrious and rational."⁸⁰ By removing portions from the common supply man mixes it with his labor, thus reducing it to his own. The laborer is entitled to the objects of his toil — "at least where there is enough and as good left in the common for others."⁸¹ The natural right to appropriate to one's own use includes land as well as its produce, for while in nature the measure of appropriation from the community is the need of the appropriator, private cultivation of land is justified because it increases the common stock.⁸² Land value results largely from the labor that is put into it. Money as a commodity vastly extends the disproportionate use that may properly be made of land; and by common consent private ownership of land is enlarged far beyond the limits authorized by the natural right of appropriation.⁸³

Originally intended as a justification for a limited sovereignty and the guarantee of individual rights of man which it is the function of civil government to protect, Locke's theories, founded upon nature and a peaceful existence of man, have supported not only the aims of the Founding Fathers, but the rise of capitalistic democracy in industrial America. For him the purpose of civil government was to protect man in his natural rights, and to establish the rules by which disputes regarding these rights should be measured. He stood for constitutionalism, individual liberties and ownership of private property, government by consent of the governed, and the right of revolution, a doctrine made more famous for us by Thomas Jeffer-

⁷⁷ *Id.* §146.

⁷⁸ *Id.* §160.

⁷⁹ ROOSEVELT, AUTOBIOGRAPHY 388 and 389.

⁸⁰ SECOND TREATISE, *supra* §§25, 26, 30, 32 and 34.

⁸¹ *Id.* §§28 and 44.

⁸² *Id.* §§36 and 39.

⁸³ *Id.* §50.

son and recognized by Abraham Lincoln in his first inaugural address.⁸⁴ In the dispute regarding the supremacy of the executive over the legislature, his experience with English monarchy caused him to cast the weight of his argument in favor of the legislature, and his views in support of representative government documented the proclamation of the colonies that there should be "no taxation without representation."

The first direct effect in colonial America of Locke's views on government, however, concerned not property rights but religious toleration. This guaranty he incorporated into The Fundamental Constitution of Carolina (1669), which he drafted for Lord Ashley, his patron and chief colonial proprietor.⁸⁵ The same organic law stated that "it shall be a base and vile thing to plead for money or reward," and required of all but near kinsmen who pleaded another's cause in court an oath "that he doth not plead for money or reward, nor hath nor will receive, nor directly nor indirectly bargained with the party whose cause he is going to plead, for money or any other reward for pleading his cause."⁸⁶

Curtailement of lawyers' remuneration in the trial of cases was not long lived, and the right of revolution has given way to one of constitutional change by means of the ballot. Further, the social view of private property and the distinction between personal and property rights that are daily becoming more vocal, reminds us that the premise of Locke's labor theory was God's gift of the earth to men in common. From this assumption Jefferson drew the conclusion that the earth belongs to the living rather than to the dead.⁸⁷ And it was Thomas Paine who called Jefferson's attention to the generic distinction between rights of personal competency, such as "thinking, speaking, forming and giving opinions," which need no exterior assistance to be enjoyed, and rights of personal protection, "of acquiring and possessing property," asserting that man retained the former when he entered the civil society; it was only the latter, or defective rights in nature, which he surrendered under the social contract in exchange for civil rights.⁸⁸ But Locke's argument in support of the legislature in its contest for power with the executive is a perennial one in Washington; and his faith in representative, constitutional government remains the basic tenet of American democratic government.

⁸⁴ 2 COMPLETE WORKS OF ABRAHAM LINCOLN 1 at 6 (Nicolas and Hay ed.).

⁸⁵ SECOND TREATISE, *supra* at xxxiii; 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND ORGANIC LAWS 1669, §109 (Poore ed.).

⁸⁶ *Id.* §70.

⁸⁷ Jefferson to James Madison, Paris, Sept. 6, 1789; 5 THE WRITINGS OF THOMAS JEFFERSON 115 at 12 (Ford ed.); Paine, *The Rights of Man* in 1 THE COMPLETE WRITINGS OF THOMAS PAINE 251 (Foner ed.).

⁸⁸ Paine to Jefferson, 1789, WRITINGS, *id.* vol. 2 at 1298.

Another eighteenth century writer of importance to Americans is Charles Louis de Secondat, Baron de Montesquieu (1689-1755). Like his predecessors in political theory, in *The Spirit of the Laws* (1748) Montesquieu began his reasoning with a state of nature. His natural man was weak and obsessed with fear.⁸⁹ A desire for peace, for nourishment and for companionship explains his preference to live in society.⁹⁰ Only upon entering civil society did he overcome his sense of weakness. Then equality ceased and war began between states and also between men. These two conditions of war gave rise to positive law.⁹¹

Montesquieu defined laws in their most general meaning as "the necessary relations arising from the nature of things."⁹² Positive law consists of human reason by which men work out these relations. They should be in accord with the climate, soil and occupation of the natives, with their religion and wealth, and also with the degree of liberty which they enjoy. The sum of these relations constitutes the spirit of the laws.⁹³ His positive law, then, results from the impact of external forces upon man.⁹⁴ It changes "as the will of man changes."⁹⁵ His study of their spirit is empirical and his method is comparative.

Although in a democracy people appear to do what they please, political liberty is not unlimited freedom. On the contrary in a government under law, liberty is simply "a right of doing whatever the law permits." It can only consist "in the power of doing what we ought to will, and in being constrained to do what we ought not to will."⁹⁶ Consequently the limits which this conception of liberty imposes, are prescribed by the nature of the state.

As it relates to the constitution of a democratic state, wrote Montesquieu, political liberty requires the executive to be separate from the legislative and to exercise a check upon its actions. The legislature, too, should be independent, composed of a body of nobles and of one which represents the people. The judiciary, which Montesquieu considered "in some measure next to nothing,"⁹⁷ in turn should be separate from the other two branches of government, thus he proposed both a separation of powers and a doctrine of checks and balances.⁹⁸

Regardless of whether, as some have said, *The Spirit of the Laws*

⁸⁹ 1 *THE SPIRIT OF THE LAWS* (Nugent trans.) 4.

⁹⁰ *Id.* at 4 and 5.

⁹¹ *Id.* at 5.

⁹² *Id.* at 1.

⁹³ *Id.* at 6 and 7.

⁹⁴ *MAINE'S ANCIENT LAW* 125 (Pollock ed.).

⁹⁵ *THE SPIRIT OF THE LAWS*, *supra* vol. 2 at 59.

⁹⁶ *Id.* vol. 1 at 150.

⁹⁷ *Id.* at 156.

⁹⁸ *Id.* at 151-162.

was inspired by an inaccurate appraisal of English constitutionalism, Montesquieu's scheme of checks and balances in government, through the medium of an independent legislature, executive and judiciary, supported the form of government adopted in the Constitution. His theory of legislation as the prerogative of the legislature, subordinates the policy-making function of the executive to a degree repudiated by modern experience. When rigidly applied it also reduces the judicial process to one of logical application of legal rules. This recalls the attitude of Justice Holmes toward legislative experimentation and Justice Stone's trenchant reminder to the Supreme Court of the need for exercising a "sense of self-restraint" when passing upon the constitutionality of legislation.⁹⁹ Although stated by Montesquieu with reference to civil law, his theory is also directly applicable to the function of courts of common law, and would deny to them the privilege and duty of conforming legal rules to the needs of social change. The Spirit of the Laws is an important and pioneering work in comparative, sociological jurisprudence, yet Montesquieu's doctrine of separation of powers and of legislative control of policy-making is the language of analytical jurisprudence, and his curtailment of the judicial function is contrary to the duty conferred upon it today by sociological jurisprudence.¹⁰⁰

The importance of these seventeenth and eighteenth century writers on government does not lie in the historical accuracy or inaccuracy of their divergent theories. Absolutism versus popular government, however, concerns issues which are as urgent now as when Hobbes wrote. As in England so in America it was Locke's thesis with its respect for individual rights and limited power of government that served as a guide. And Montesquieu's framework, even though proposed for monarchy, offered greater allure than the divine prerogative of kingship descending from Adam. But since the enactment of the Fourteenth Amendment to the Constitution, Hobbes' doctrine of positivism and of the separation of ethical theories from actual legal rules has gained the ascendancy in jurisprudence. In the state of nature there is sufficient diversity for publicists, lay or clerical, to discover the rational source of whatever form of the political community that is desired. Today, the function of government, its attitude toward the individual, toward his property and toward his various freedoms is more rarely discussed in terms of the conditions under which man lived prior to the institution of civil society, than it was during the Age of Reason. It is interesting to note, though, that now even as during the days of social contract, constitutions, state and federal, with their provisions for amendment, just as modern pro-

⁹⁹ *United States v. Butler*, 297 U.S. 1, 79 (1936).

¹⁰⁰ *THE SPIRIT OF THE LAWS*, *supra* at lxvii.

posals for world government, attest to the theory of convention as a source, and of government by the consent of the governed as the function of civil institutions.¹⁰¹

Ius Naturale AND Ius Gentium

Concepts of natural law, of the state and of the rights of man, developed by the Church Fathers and ultimately by Saint Thomas have survived to the present in the environment of the church which reared them. But they were not to continue unchallenged as the ultimate interpretation of nature. This was inevitable as Protestantism developed its varying creeds, as nationalism rose to contest the dominance of the Church, and as rationalism and humanism turned men's thoughts from metaphysical explanations to a reasoned consideration of man as a social phenomenon. While Christianity remained as the ultimate explanation and the state of nature as the point of origin, gradually emphasis shifted from the supernatural to the natural, and the nature of man substituted for revelation as the hypothesis for discovering the will of God, regarding the proper ordering of his universe. The shift in approach among political writers of the sixteenth through the eighteenth centuries was discussed in the preceding section. It is further illustrated in the field of international law, beginning with Hugo Grotius, who is sometimes credited both as being the founder of the subject and the author of modern conceptions of natural law.

Grotius (1583-1645), the Dutch publicist, though not the first to develop international law, was at least its first great systematizer. Writing during the Thirty Years War, he sought to discover and record the rules of law which should govern the actions of nations in peace and in war. He began, as was the custom, with the natural state of man, of which America furnished an example. In it there was a community of property.¹⁰² Later this common use of things was prevented by the dispersal of peoples over the earth and by want of justice.¹⁰³ Thereafter the basis of dominion over property became a pact, express or implied, or tacit as by occupation.¹⁰⁴ From the inability of families to protect themselves states developed, as free men through agreement formed associations for the enjoyment of law, and for mutual utility.¹⁰⁵ So long as the sovereign of such a state does not transgress the divine of

¹⁰¹ COHEN, THE MEANING OF HUMAN HISTORY 238-245.

¹⁰² GROTIUS, DE JURE BELLI ET PACIS (Whewell trans. 1625), 2,2,2,1.

¹⁰³ *Id.* at 2, 2, 2, 4.

¹⁰⁴ *Id.* at 2, 2, 2, 5; 2, 2, 3, 3.

¹⁰⁵ *Id.* at 1, 4, 7, 3; 1, 1, 14, 1.

natural law, his subjects are bound to obey him.¹⁰⁶

Grotius distinguished between natural law and three types of positive law: divine law, civil law and *ius gentium*.¹⁰⁷ He carefully disavowed any intention to depart from the accepted belief in God as the ultimate source of all law.¹⁰⁸ The divine law to which all must submit was given to man at the time of the creation, following the deluge and at the coming of Christ.¹⁰⁹ This recognition of God as the finite source of law is important because of its bearing upon Grotius' conception of natural law, as he shifted from a purely scholastic approach to one of humanism.

The source of natural law, according to Grotius, is the social being of mankind desirous of living in a condition of tranquility. Human nature is the mother of right, or natural law, which leads to a desire for human society.¹¹⁰ Natural law "is the Dictate of Right Reason, indicating that an act, from its agreement or disagreement with the rational and social nature of man has in it a moral turpitude or a moral necessity; and consequently that such act is forbidden or commanded by God, the author of nature."¹¹¹ Reason, Grotius believed, directed toward the social objective of the human race as ordained by God, produces natural law. This law is so immutable that even God cannot change it. Indeed, if it were possible for there to be no God, there would still be a natural law, based upon reason in the furtherance of man's social existence.¹¹²

This famous statement by Grotius regarding the immutability of natural law has been explained as merely an emphasis placed upon the reason of God, as distinguished from his will, as the source of law;¹¹³ and as a reliance upon reason as the means for discovering God's will in the absence of revelation.¹¹⁴ As a use of man's reasoning power to interpret the needs of society, it is indicative of humanism as distinguished from scholasticism in the development of the natural law concept. It justifies property rights as well as contract rights for their tendency to conserve society; and rejects utility in favor of human nature as the source, as distinguished from an enforcing factor, of natural rights. He founded civil laws upon the obligation of mutual compacts. But since compacts in turn derive their force from nature, it may be said that nature, if not the mother, at least is

¹⁰⁶ *Id.* at 1, c. 4.

¹⁰⁷ *Id.* at 1, 1, 13, 1.

¹⁰⁸ *Id.* Prologue at 61.

¹⁰⁹ *Id.* Prologue at 13; 1, 1, 15, 2.

¹¹⁰ *Id.* Prologue at 5-8.

¹¹¹ *Id.* at 1, 1, 10, 1, as modified by Barbeyrac, and 1, 1, 12, 1.

¹¹² *Id.* Prologue at 11; 1, 1, 10, 5.

¹¹³ Chroust, *Hugo Grotius and the Scholastic Natural Law Tradition*, 17 THE NEW SCHOLASTICISM 101 and 125.

¹¹⁴ 1 BURLAMAQUI, THE PRINCIPALES OF NATURAL LAW (Nugent trans.) 151.

a proximate ancestor of civil law. The geneology is human nature, natural law and then civil law.¹¹⁵

It was to *ius gentium* that Grotius turned for the development of international law. While natural law was discovered through the agreement of reason with the social nature of man, *ius gentium*, he said arose from usage. It was the universal or nearly universal law of nations, discovered in its use and by the testimony of experts and savants.¹¹⁶ With the Romans *ius gentium* was a customary, private law for foreigners, which, during the later period of general Roman citizenship, acquired a philosophical and theoretically universal content. By Grotius' time the need for a public law among nations led to an alteration in the meaning of the term *ius gentium* to meet this requirement. He distinguished it from natural law, but recognized that despite its origin in common usage by nations, it no more than *ius naturale* could rest solely upon utility.¹¹⁷ Just as the Roman *ius gentium* grew to approach the quality of natural law, so the requirement of selection among competing international standards forbade the acceptance of all such practices as "truly and universally lawful."¹¹⁸ Indeed, Grotius' purpose in writing his treatise was to moralize as well as to standardize the rules of peace and war among nations. Although the immediate source of his international law was the common usage or will of nations,¹¹⁹ it would seem that just as in the case of civil law the common ancestor of his *ius gentium*, too, was natural law. Dunning says that by general consent Grotius' work laid the foundations of international law as a science "in which is to be found the perfect fruit of the doctrine of the law of nature."¹²⁰ It was a system of international law founded upon the principles of morality as evidenced in the socially acceptable international practices of the Christian world.¹²¹ His starting point for natural law in social impulse as distinguished from revelation on the one hand, and utility or individual self-advantage on the other, offered a fresh and humanistic approach to natural law, too. On this score it would scarcely be disputed by Leon Duguit with his thesis of social solidarity as the source of law,¹²² or by Harold Laski, who considered rights as those conditions of social life which man needs for the attainment of his better self.¹²³

115 DE JURE BELLI ET PACIS, *supra* Prologue at 16.

116 *Id.* at 1, 1, 14, 2.

117 *Id.* Prologue at 18.

118 *Id.* Prologue at 41; 1, 1, 12, 1.

119 *Id.* at 1, 1, 14, 1 and 2.

120 DUNNING, POLITICAL THEORIES FROM LUTHER TO MONTESQUIEU 153.

121 *Id.* at v.

122 Duguit, *Theory of Objective Law Anterior of the State*, 7 MODERN FRENCH LEGAL PHILOSOPHY SERIES ch. X, §179.

123 LASKI, A GRAMMAR OF POLITICS 91.

Grotius based his treatise on the social nature of man; Hobbes accented man's egoism. These divergent viewpoints produced corresponding contrasts in their objectives of government. Pondering on these differences, Samuel Pufendorf (1632-1694), the German jurist, in 1660 wrote an essay entitled *Elements of Universal Jurisprudence*. Twelve years later, following professorships on the Law of Nature at the Universities of Heidelberg and Lund, he published his *Law of Nature and Nations*. In it he rejected Hobbes' warring state of nature for one of peace, though insecure, existing as a prehistoric fact only in the qualified sense of a very primitive society.¹²⁴ In this state of nature men lived in family groups. The true cause of civil government he considered to be the desire of the heads of these families to protect their kinsmen from injuries which one man is in danger of sustaining from another.¹²⁵ For this purpose civil society is the best safeguard that can be conceived or invented.¹²⁶

Pufendorf also rejected Hobbes' theory of a single social contract by which man both created the civil state and surrendered his rights in nature to an absolute sovereign. In place of the single contract he advanced the theory of a two-fold contract. In the first of these men agreed among themselves upon a form of government. In the second the ruler and the ruled provided for their mutual rights and duties.¹²⁷

Pufendorf disagreed with Grotius' conception of a natural law in the absence of God,¹²⁸ but agreed with him that natural law is the result of man's societal tendency. God, he believed, created man as a social animal, with the duty imposed upon him to observe those laws discoverable by his reason, which further his preservation and the objects of his creation. Reason is not the law of nature, but is the means of its discovery.¹²⁹ Following Hobbes, Pufendorf made no distinction between the natural law of man and of states, denying to either of them a positive existence as law in the Hobbesian sense.¹³⁰ By this analysis natural law is a societal product, possessed of an ethical content, dignified with a sanction, though remote, of God's will, but lacking the legal force of an ordinance of a superior power.

His treatise, devoted primarily to the subject of international law, together with commentaries by Babeyrac, was for many years a standard text, translated into many languages, including English. It

¹²⁴ PUFENDORF, *THE LAW OF NATURE AND NATIONS* (Kennett trans. 4th ed. 1728) 2, 2, 4 ff.

¹²⁵ *Id.* at 7, 1, 7.

¹²⁶ *Id.* at 7, 1, 8.

¹²⁷ *Id.* at 7, 2, 7 and 8.

¹²⁸ *Id.* at 2, 3, 19.

¹²⁹ *Id.* at 2, 3, 15 and 20.

¹³⁰ *Id.* at 2, 3, 23; See NUSSBAUM, *A CONCISE HISTORY OF THE LAWS OF NATIONS* 114-118.

was published in the same year as Bishop Cumberland's *De Legibus Naturae*, which in later editions Pufendorf cited with approval.

To these writings of protestant jurists on international law should be added that of Jean Jacques Burlamaqui (1694-1748), counselor of state for Switzerland and for fifteen years honorary professor of natural and civil law at Geneva. In 1747 his *Principles of Natural Law* was published, followed in 1751 by *The Principles of Politic Law*. Burlamaqui pursued the best traditions of his predecessors in developing his system of natural law. God, the first cause of unmoved mover of Aristotle's metaphysics, is the ultimate source of law.¹³¹ He created man as a social being endowed with an innate moral sense and with an ability to reason. Because the Divine Will is based upon Divine Reason,¹³² man may ascertain its objectives toward himself through the use of reason and an innate moral sense.¹³³ Hence those rules of reason which are conducive to man's preservation, perfection and happiness as a social being¹³⁴ are natural laws—that is laws which are derived from the nature of man and from his relation to other beings.¹³⁵ Since there is a moral obligation to obey what is reasonable, natural law is sanctioned both by reason and by God's will and should be obeyed.¹³⁶ The existence of this law is universal¹³⁷ and its observance produces happiness.¹³⁸ While with Hobbes, Burlamaqui considered the law of nations to be only a division of natural law,¹³⁹ he recognized a distinction between a necessary, universal law of nations which is part of natural law, and an arbitrary one dependent upon convention. On this basis he reconciled his position with that of Grotius.¹⁴⁰

During Burlamaqui's lifetime another Swiss jurist was writing on natural and international law. This was Emeric de Vattel (1714-1767), who in 1758 published his *Law of Nations or Principles of the Law of Nature applied to the Conduct and Affairs of Nations and Sovereigns*. The chief merit of this work consisted in its presenting the viewpoint of Christian Wolff (1679-1754) on the subject. Wolff was a German philosopher and mathematician, whose work on *Jus Naturale* and *Jus Gentium* appeared between 1740 and 1749. With Grotius and contrary to Hobbes and Pufendorf, Vattel, following Wolff, distinguished the law of nations from that of nature. States, said Vattel,

¹³¹ BURLAMAQUI, *supra* vol. 1 at 90.

¹³² *Id.* at 129.

¹³³ *Id.* at 142 and 143.

¹³⁴ *Id.* at 112, 113 and 117.

¹³⁵ *Id.* at 109 and 112.

¹³⁶ *Id.* at 130, 145, 150 and 184.

¹³⁷ *Id.* at 131.

¹³⁸ *Id.* at 185, 187 and 188.

¹³⁹ *Id.* at 136.

¹⁴⁰ *Id.* at 137 and 138.

are associations of persons who mutually engage to procure their common welfare.¹⁴¹ Such societies are recommended to men by the law of nature as the true means of supplying their wants.¹⁴² They are moral persons, and like individuals states, too, should live in a manner which is conformable to nature.¹⁴³ Although the sovereign lives above the penal law and his person is inviolate,¹⁴⁴ yet his powers are limited by the fundamental law on which the state is based,¹⁴⁵ and he may be called to account for acts of tyranny.¹⁴⁶

Ius gentium, Vattel said, was originally only the law of nature applied to nations, with such differences as result from the substitution of nations for individuals. This law contains its own internal justification. It is a necessary law of nations, so called because nations are bound in conscience to obey it. It is immutable because it consists of immutable natural laws.¹⁴⁷ In addition to this body of internal or natural law of nations, there is an external or positive law which proceeds from the volition of nations. This is partly a voluntary law, resting upon the presumed consent of nations, to which they submit as rules of common welfare and safety;¹⁴⁸ partly conventional, based upon express consent; and thirdly customary, proceeding from their tacit consent.¹⁴⁹

Vattel forms a link between the older works on international law and modern ones, which base the law of nations upon custom, convention and agreement. His *Law of Nations* was a widely read treatise, translated into English in 1760.¹⁵⁰

From the standpoint of American natural law theory the importance of these writers of the Reformation on the law of nations is two-fold. First, while they were wholly religious in their acceptance of God as the ultimate source of law, they broke from scholastic tradition in their method of developing the natural law out of which arose civil government and international law. Stressing the social nature of man and his reason as the primary element of natural law, they expressed the humanism of their period, in contrast to the metaphysics of a purely theological approach to government and law. Second, their works were read by American statesmen and lawyers, and were quoted by judges seeking in the precedents of comparative law, to sustain the

141 VATTEL, *THE LAW OF NATIONS* bk. 1, §§1 and 16.

142 *Id.* §16.

143 *Id.* §11 and Preliminaries §2.

144 *Id.* bk. 1, §§49 and 50.

145 *Id.* §§45 and 50.

146 *Id.* §51.

147 *Id.* at 2, 3, xii.

148 *Id.* at xii.

149 *Id.* at 7 and 8.

150 STONE, *THE PROVINCE AND FUNCTION OF LAW* 231, n. 49.

new and fragile framework of an incipient common law.¹⁵¹ In the specialized field of international law they added their testimony to the thesis that reason and nature can supply man with a philosophy of international relations, as well as with rules by which those relations can be administered. Unless the *ius gentium*, like the *ius naturale*, has the force of positive law, nations are bound only by convention, and otherwise exist in a world of international anarchy. In so far as these writers countenanced a universal law among nations similar to one for individuals, they were laying a foundation not only for their own time,¹⁵² but for periods when international tribunals of the future, whether of peace or war, should ponder the existence of international law,¹⁵³ and when assemblies of nations should turn to the problem of international bills of rights. Definitions of law from this standpoint have more than academic importance.¹⁵⁴

From these European writers on international law the shift now is to England, and to the influence which natural law theory had on the development of the common law.

ENGLISH LAW AND LEGAL WRITERS

England had no general reception of Roman civil law, and the weight to be accorded its influence by the presence of Roman military forces prior to their withdrawal in 410 A. D. is problematical. Even so, the ethical theory of Roman-law doctrine is manifest in the development of the common law.¹⁵⁵ In 597, Aethelbert, King of Kent, having married Bertha, the Christian daughter of Charebert, King of Paris, received at Canterbury a mission of Roman Catholic priests from Gregory the Great. This mission was headed by Augustine, who became the first archbishop of Canterbury. Christianity was reintroduced into England,¹⁵⁶ and a few years later Aethelbert in Roman fashion issued his code of laws (c. 602), the first to be written in the English language.¹⁵⁷ The influence of Augustine upon the king is disclosed in the opening list of fines of which the code is composed:

¹⁵¹ *Pierson v. Post*, 3 Caines 175, 2 Am. Dec. 264 (N.Y. 1805); Kent, *An American Law Student of a Hundred Years Ago* in 1 SELECTED ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 837.

¹⁵² GIERKE, *supra* at 96-102.

¹⁵³ Lord Wright, *Natural Law and International Law* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHY 794-807 (Sayre ed.).

¹⁵⁴ WINFIELD, *THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY* ch. IV.

¹⁵⁵ SCRUTTON, *Roman Influence in Chancery, Church Courts, Admiralty, and Law Merchant* in 1 SELECT ESSAYS ON ANGLO-AMERICAN LEGAL HISTORY 208.

¹⁵⁶ PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 8 (4th ed.).

¹⁵⁷ 2 HOLDSWORTH'S *HISTORY OF ENGLISH LAW* 14 and 19; MAITLAND AND MONTAGUE, *A SKETCH OF ENGLISH LEGAL HISTORY* 3 ff.

"The property of God and the church, twelve-fold; a bishop's property, eleven-fold; a priest's property, nine-fold."¹⁵⁸ It would appear that the newly restored religion had not dispensed with the need of a strict and enforceable criminal code.

More than five centuries after Augustine arrived in England, Theobald (d. 1161), archbishop of Canterbury, summoned to his household—which already included John of Salisbury and Thomas Becket¹⁵⁹—Vacarius, a Bolognese canonist and civilian. About the year 1149 Vacarius introduced the teaching of Roman law at Oxford, and wrote his *Leber Pauperum*, which was a compilation of nine books of Justinian's Digest and Code,¹⁶⁰ intended for the use of students. King Stephen suppressed Vacarius' teaching of civil law,¹⁶¹ and in 1234 Henry III forbade it to be taught in London. Later John Wycliffe (c. 1320-1384) proposed that it be replaced at Oxford and Cambridge by a study of English law.¹⁶² Nevertheless its instruction persisted¹⁶³ and not long after Reginald Pole (1500-1558), archbishop of Canterbury and later cardinal, made his proposal for a complete reception of civil law, Henry VIII (r. 1509-1547) founded professorships in the subject at both universities.¹⁶⁴ Meanwhile the celebrated *De Legibus et Consuetudinibus Angliae* of Bracton (d. 1268), first published in 1569, demonstrated the indelible effect which civil law had left both upon the common law and upon those who steered its course in England. But despite this intermittent imminence of a conquest of England by civil law, Mathew Hale (1609-1676), the Lord Chief Justice, could write in his *History of the Common Law*,¹⁶⁵ that except in ecclesiastical, admiralty and military courts, the civil law was no more binding in England than common law was binding in Rome.

From Aethelbert to Danute, the Dane (995-1035), a succession of codes by Kentish and West Saxon kings illuminated by specific provisions the growing importance of the clergy in addition to the Witan, or council of wise men, in the proclaiming of royal dooms.¹⁶⁶ King Alfred (r. 871-901) introduced his code with a series of directives both

¹⁵⁸ THORPE, *ANCIENT LAWS AND INSTITUTIONS OF ENGLAND* I.

¹⁵⁹ GREEN, *A SHORT HISTORY OF THE ENGLISH PEOPLE* 133 (rev. ed.); 1 POLLOCK AND MAITLAND, *HISTORY OF THE ENGLISH LAW* ch. 5 (rev. ed.).

¹⁶⁰ *THE LIBER PAUPERUM OF VACARIUS*, SELDEN SOCIETY, vol. 44, intro. vx, xxi.

¹⁶¹ Selden, *Ad Fletam*, CAMBRIDGE STUDIES IN LEGAL HISTORY 109 ff.

¹⁶² Maitland, *English Law and the Renaissance* in 1 SELECT ESSAYS ON ANGLO-AMERICAN LEGAL HISTORY 173; POUND, *THE SPIRIT OF THE COMMON LAW* 39.

¹⁶³ BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* intro. §1, pp. 18 ff. (Colley ed.).

¹⁶⁴ Maitland, *English Law and the Renaissance* in 1 SELECT ESSAYS ON ANGLO-AMERICAN LEGAL HISTORY 173-176; WINFIELD, *supra* at 59; PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 43 and 44 (6th ed.).

¹⁶⁵ HALE, *THE HISTORY OF THE COMMON LAW* 24 (6th ed.).

¹⁶⁶ THORPE, *supra*; HOLDSWORTH, *supra* vol. 9 at 12-25.

ecclesiastical and lay, advising his subjects that "these are the dooms which the Almighty God himself spake unto Moses, and commanded him to keep."¹⁶⁷ In Aethelstan's code tithes are prescribed "with the advice of my Archbishop, Wulfhelm, and of my other bishops also."¹⁶⁸

The Norman conquest of England by William the Conqueror in 1066 would not be expected to interfere with the Roman-Christian influence upon the development of English common law, and might in fact strengthen that influence.¹⁶⁹ Doubtlessly civil law was studied at Canterbury and York before Vacarius began his Oxford lectures.¹⁷⁰ In the field of canon law the Decretum Gratianus (c. 1148), even though not official, the compilations of decretals authorized in 1234 by Gregory IX, and the eventual Corpus Juris Canonici facilitated the study and practice of church law in ecclesiastical courts.¹⁷¹ Disputes within the Church arising from the views of Duns Scotus (c. 1265-1308) and William of Occam (d. c. 1349) only emphasize the importance of theological, natural law as an ingredient of the English common law. Its influence in law texts is noted from the time of the Norman conquest.

The Conquest marked the end of the Anglo-Saxon reign and the beginning of a transition from Kentish and West Saxon dooms to the rise and development of the English system of common law. King William imposed the Norman feudal system upon England, but promised to uphold the laws of Edward the Confessor, whose lawful successor he claimed to be.¹⁷² In one respect the Christian-Roman influence of the Church was directly affected by the Conquest. This was the result of William's ordinance which decreed the separation of lay and ecclesiastical jurisdiction. In Anglo-Saxon times the hundred courts heard both spiritual and temporal offenses, and the presence of the bishop as a member of the court could scarcely have diminished the influence of Christian as well as of Roman doctrine in the decision of cases. An attempt by Henry I to restore the old order met with the disapproval of the Church.¹⁷³ The development of a separate ecclesiastical jurisdiction followed, accompanied by the study and application of canon law, aided by its systematic treatment in the canonical compilations, to which reference was just made.¹⁷⁴

¹⁶⁷ THORPE, *supra* at 25; TURK, THE LEGAL CODE OF AELFRED THE GREAT 30 - 48.

¹⁶⁸ *Id.* at 82.

¹⁶⁹ BLACKSTONE, *supra* bk. III, ch. 5.

¹⁷⁰ See HOLDSWORTH, *supra* vol. 2 at 176-178.

¹⁷¹ PLUCKNETT, *supra* at 287-289; MAITLAND, CANON LAW IN THE CHURCH OF ENGLAND; Stubbs, *The History of the Canon Law in England* in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 248-288.

¹⁷² I REEVES, HISTORY OF THE ENGLISH LAW 56 ff. (Finlason ed.).

¹⁷³ BLACKSTONE, *supra* bk. 3, ch. 5 pp. 63.

¹⁷⁴ PLUCKNETT, *supra* at 287-289; MAITLAND, CANON LAW IN THE CHURCH OF ENGLAND.

In another way, however, the Church maintained its influence upon the developing English legal system. This was through the chancellor and the gradual evolution of his jurisdiction from one of administration to one of a curia, and eventually to the creation of equity as a coordinate system of judicial control, supplementing the common law. Beginning with Edward the Confessor (1013-1066)¹⁷⁵ and continuing until the appointment of Sir Thomas More in 1529, the chancellor was an ecclesiastic, trained in canon and civil but not in common law.¹⁷⁶ An archbishop or cardinal in the chancellor's seat rendered justice according to the law of God or reason, or the law of the land if compatible with God's law or reason. These bodies of doctrine formed the basis for the rules which guided his conscience.¹⁷⁷

Law texts during early Norman times harked back to the Anglo-Saxon period and add no light to the philosophical influences which were shaping English common law.¹⁷⁸ But native insular law was forming, and its first important text, written in Latin, is attributed to Ranulph de Glanvill (c. 1130-1190), justice and prime minister to Henry II, though it may have been partly at least the work of his nephew, Hubert Walter, subsequently Chief Judiciar of England and Archbishop of Canterbury.¹⁷⁹ Its title is self-explanatory: "A Treatise on the Laws and Customs of the Kingdom of England"; and then in explanation: "The present work contains those Laws and Customs only, according to which Pleas are determined in the King's Court, the Exchequer, and before the Justices, wheresoever they may be." But while basically Glanvill's treatise deals with the common law of the courts, its breadth of scope and even some of its content are clearly attributable to Roman civil and to cannon-law influence. Its preface in form imitates that of Justinians' Institutes.¹⁸⁰

The second great treatise on English common law was probably written between 1250 and 1258¹⁸¹ by Henry of Bratton (d. 1268), who was justice of assize for Henry III and for a time was a judge of the king's central court. Bratton's notebook, which in 1884 was discovered by Vinogradoff and edited by Maitland (1889), contains transcripts of about two thousand court rolls to which Bratton (or Bratton) as judge had access. Upon this solid base of case law he wrote his voluminous *De*

¹⁷⁵ ENCYC. BRIT., CHANCELLOR.

¹⁷⁶ REEVES, *supra* vol. 2 at 600 and 610. More's services to the Church were recognized in 1935 when he was canonized by Pope Pius XI.

¹⁷⁷ *Ibid.*, also vol. 3 at 396 and 400; HOLDSWORTH, *supra* vol. 5 at 216.

¹⁷⁸ POLLOCK AND MAITLAND, *supra* vol. 1 at 97-104.

¹⁷⁹ *Id.* at 162-164; Maitland, *Glanvill Revised*, 6 HARV. L. REV. 1; HOLDSWORTH, *supra* vol. 2 at 189.

¹⁸⁰ GLANVILL (Beames trans.) n. 1 to Preface; HOLDSWORTH, *supra* vol. 2 at 203; REEVES, *supra* vol. 1 at 256.

¹⁸¹ POLLOCK AND MAITLAND, *supra* at 207.

Legibus et Consuetudinibus Angliae, which was first published in 1569. But the influence of Azo, the Bolognese glossator, and of canon law was strong upon Bracton—which fact should not be unexpected of one who later became in turn a parish rector, an arch-deacon and in 1264 chancellor of Exeter Cathedral. Accordingly Bracton found no difficulty in viewing the king, though not inferior to his liegemen, as “subject to God and to the law, for the law makes the king.”¹⁸² Law, he considered as simply “the common precept of prudent men in council,” or “the common warrant of the body politic.” And, since God is the author of justice, then right and law are synonymous—though custom through long usage may fill the place of law.¹⁸³ Jurisprudence he defined, after Justinian, as “knowledge of divine and human things, the science of what is just and unjust.”¹⁸⁴ A “natural right is that which nature, that is God himself, has taught all animals.”¹⁸⁵ The Christianized Roman influence upon this ecclesiastical English jurist is apparent, regardless of how justified may have been his divergence from actual case law for philosophical support or for supplementing doctrine in producing this “crown and flower of English medieval jurisprudence.”¹⁸⁶

Bracton's work was followed by several imitators.¹⁸⁷ In about 1290 Gilbert Thornton, Chief Justice of the King's Bench, produced his *Summa*.¹⁸⁸ At about the same time (c. 1290) appeared the book known as *Fleta*, which may have been written by a disbarred barrister while an inmate of Fleet Prison.¹⁸⁹ And possibly in 1291 there was *Britton*, which was an attempt to state in French the law as spoken by King Edward I. Each of these texts was either an epitome of Bracton's monumental work or was based upon it.¹⁹⁰

These minor treatises derived from Bracton shed no additional light upon the interplay between natural law philosophy and English legal doctrine. This is not the case, however, with *The Mirror of Justices*, which was probably from the pen of Andrew Horn (d.

¹⁸² 1 DE LEGIBUS 39 (Twiss ed.).

¹⁸³ *Id.* at 13.

¹⁸⁴ *Id.* at 19. “Jurisprudence is the knowledge of things divine and human; the science of the just and the unjust.” JUSTINIAN'S INSTITUTES (Sandars trans.) 1, 1; ULPIAN, DIGEST 1, 1, 10.

¹⁸⁵ DE LEGIBUS, *supra* at 23.

¹⁸⁶ POLLOCK AND MAITLAND, *supra* vol. 1 at 206 ff. Cf. MAINE, ANCIENT LAW 87 (10th ed.); GUTERBOCK, BRACON AND HIS RELATION TO THE ROMAN LAW (Coxe trans.); 8 BRACON AND AZO (Maitland ed.).

¹⁸⁷ POLLOCK AND MAITLAND, *supra* at 209 and 210.

¹⁸⁸ SELDEN'S DISSERTATION ON FLETA xxii, 15-19 (Ogg ed.); Woodbine, *The Summa of Gilbert de Thornton*, 25 L. Q. REV. 44; Plucknett, *The Harvard Manuscript of Thornton's Summa*, 51 HARV. L. REV. 1038.

¹⁸⁹ HOLDSWORTH, *supra* vol. 2 at 321; SELDEN'S DISSERTATION ON FLETA, *supra* at xxiii.

¹⁹⁰ POLLOCK AND MAITLAND, *supra* vol. 1 at 210.

1328),¹⁹¹ a fishmonger of London, man of wealth and literary pursuits who rose to become chamberlain of his city. Maitland describes the author as possessing some of the qualities of a "lawyer, antiquary, preacher, agitator, pedant, faddest, lunatic, romancer, liar," perhaps with that of romancer predominating.¹⁹² Like Fleta, and unlike Glanvill, Bracton and Britton which were marked successes, the Mirror was a failure. Written in about 1290 and subsequently described by Lord Coke¹⁹³ as "an ancient and learned treatise," its authenticity as an accurate reflection of ancient Anglo-Saxon practices seems to have been first questioned by Reeves.¹⁹⁴ But whether authentic as a record of legal history or interesting as English folk lore, the Mirror illustrates the considerable Christian influence upon legal institutions at the time when it was written. "Law," wrote Horn, "is nothing else than the rules laid down by our holy predecessors in Holy Writ." Trial by battle is justified by the mortal contest between David and Goliath.¹⁹⁵ This was neither the first nor the last time for biblical lore to be used in support of mundane legal institutions. Its innovation lies solely in its quaintness.

The next great English law text after Bracton was a treatise on land tenures by Sir Henry de Littleton (c. 1407-1481), a judge of the Common Pleas (1466-1481). Written probably near the end of his life, in law French,¹⁹⁶ it was addressed to his son, Richard, as an aid to his study of law. Unlike his predecessor, Glanvill and Bracton, Littleton borrowed nothing from Roman law. It was the first text on English property law. Coke later described it not only as an ornament of the common law, but as "the most perfect and absolute work that has ever been written in any human science."¹⁹⁷ Natural law theory gains nothing from this classic of the English law.

It was Littleton's contemporary, Sir John Fortescue (c. 1394-1476), Chief Justice of the King's Bench (1442-c. 1460), whose broader interest in public law carried on the natural law tradition of his day. One of his lesser known works, *De Natura Legis Naturae*, is described as being the first treatise on the law of nature written by an Englishman.¹⁹⁸ It was composed in Scotland (1461-1464) while its author was

¹⁹¹ 7 THE MIRROR OF JUSTICES, SELDEN SOCIETY xvkk. Cf. Leadan, *The Authorship of the Mirror of Justices*, 13 L. Q. REV. 85-103; Pollock, *Book Review*, 11 L. Q. REV. 393.

¹⁹² MIRROR, *supra* at xlviii.

¹⁹³ 9 COKE'S REPORTS intro.

¹⁹⁴ REEVES, HISTORY, *supra* vol. 2 at 232 and 238; HOLDSWORTH, *supra* vol. 2 at 327-333.

¹⁹⁵ MIRROR, *supra* at xxcii, 2, 109.

¹⁹⁶ LITTLETON'S TENURES lix (Wambaugh ed.); ENCYC. BRIT., LITTLETON.

¹⁹⁷ COKE ON LITTLETON xxxvi (Hargrave and Butler ed.); WINFIELD, *supra* at 309-313; HOLDSWORTH, *supra* vol. 2 at 571 ff.

¹⁹⁸ FORTESCUE, *DE LAUDIBUS LEGUM ANGLIE* (Chrimes trans.) xiii.

in exile with the family of Henry VI, for the benefit of Prince Edward of Lancaster, and in support of his benefactor's claim to the throne.¹⁹⁹ Subsequently, while with the royal family at St. Mihiel, Fortescue wrote his best known work, *De Laudibus Legum Angliae* (1468-1471). It is in the form of a dialogue between Prince Edward and the author and was intended for the prince's instruction in legal matters. Eulogy of English law is interspersed with references to the scriptures, Grecian philosophers and natural law. "All human laws," he informs the prince, "are either laws of nature, customs, or statutes, which are also called constitutions."²⁰⁰ Indeed, not only are the laws of Deuteronomy sacred, but also all human ones, since by definition "Law is a sacred sanction commanding what is honest and forbidding the contrary."²⁰¹ But essentially, Fortescue founded English law firmly upon native ground, and with Littleton introduced an English as distinguished from a Roman renaissance of legal writing.²⁰²

Most interesting for its natural law significance is a dialogue written by Christopher Saint Germain (c. 1460-1540), entitled *Doctor and Student*. Its author studied law at the Inner Temple and in due course was called to the Bar. His library is said to have surpassed in size those of all his contemporary brethren and his Dialogue was popular and freely cited.²⁰³ It may have been first published about the year 1523. "The first ground of the law of England," said the student, "is the law of reason." Of the law of nature of the learned in the profession do not speak, but when a rule "is grounded upon the law of nature, they say that reason will that such a thing be done." This is probably an accurate explanation of the situation and influence of natural law theory in the law courts of England, as distinguished from the ecclesiastical where natural law thrived as embodied in canon law.²⁰⁴ Saint Germain's reversion to stoic theory that law in its essence is only reason, is also prophetic of Lord Coke's famous aphorism.

Sir Edward Coke (1552-1634) was considered to be the greatest lawyer of his day. In 1606 he was appointed Chief Justice of the Common Pleas, and in 1613 to the chief justiceship of the King's Bench. His *First and Second Institutes of the Laws of England* leave no question as to his faithful support of common law. And yet in the *First Institute, or Commentary upon Littleton*, he wrote that "reason is the life of the law, nay the common law itselfe is nothing else but

¹⁹⁹ WINFIELD, *supra* at 315; HOLDSWORTH, *supra* vol. 2 at 569; POLLOCK, *ESSAYS IN THE LAW* 53 and 54.

²⁰⁰ FORTESCUE, *supra* at 37.

²⁰¹ *Id.* at 9.

²⁰² *Id.* at xix.

²⁰³ WINFIELD, *supra* at 325.

²⁰⁴ HOLDSWORTH, *supra* vol. 2, App. II; POLLOCK, *ESSAYS IN THE LAW* 53 and 54.

reason"—and then added "gotten by long study, observation, and experience, and not of every man's natural reason."²⁰⁵ In line with this thought, and contrary to the indirection commonly practiced by the English bench, described by Saint Germain, Coke in Calvin's Case²⁰⁶ resorted directly to natural law including the scriptures to prove that a Scottish subject, born after King James of Scotland ascended the English throne was not an alien, and hence was capable of holding English land. The orthodoxy of his reasoning was not to be disputed. At the time of the creation God infused His law into the hearts of men. By this law men were governed before Moses, the first law reporter, put it into writing. Allegiance to the sovereign is part of that law. Since by birth Calvin owed allegiance to King James according to the natural law, "Ergo he is a natural-born subject" of England. His right to hold English land follows.²⁰⁷

On November 10, 1608, while Chief Justice of the Common Pleas, Coke, speaking for the judges of England, informed King James that although as king he might consult with the judges, he could not adjudge a case nor remove a judge from the courts and decide it himself; that no king since the Conquest had done so; that the king in the upper house of Parliament has his court of last appeal; and that although the king was not below man, he was below God and the law. The archbishop had informed the King that he had such power, which belonged to him by the word of God found in the scripture. Archbishops, too, it seems "can cite Scripture for his purpose"; though at that time he could not quite have quoted to the King from his very own authorized version of the Bible.

Also during the reign of James I there was John Selden (1584-1654) whose Table Talk has survived him as a legal classic. He was a renowned orientalist as well as jurist. In one of his lesser known works he treated The Law of Nature and of Nations according to the Sentiments of the Hebrews.²⁰⁸ In it he discussed the seven precepts which God gave to Moses, and which are said to be the basis of human justice.²⁰⁹

Two other English works should be noted in order to survey the course of English writings on the legal phase of natural law that furnished the background for American thinking during the seventeenth and eighteenth centuries. The first of these, Institutes of

²⁰⁵ 1 COKE UPON LITTLETON §138. "There are divers lawes within the realme of England . . . 3. *Lex naturae*, the law of nature." *Id.* at 11b.

²⁰⁶ 7 COKE'S REPORTS 1 (1609).

²⁰⁷ *Id.* at 12a, 13a, 24b. And see argument in *Sharlington v. Strotten*, Plowden, pt. 1, pg. 298 (case of uses).

²⁰⁸ Herzog, *John Seldon and Jewish Law*, 13 JOURNAL OF COMPARATIVE LEGISLATION (3rd Series) 236-245; HOLDSWORTH, *supra* vol. 5 at 407-412.

²⁰⁹ CUMBERLAND, *supra* at 12 and 13.

Natural Law (1754-1756), was by an ecclesiastic, Thomas Rutherforth (1712-1771), archdeacon of Essex and regius professor of divinity at Cambridge. It consisted of a series of lectures on the *De Jure Belli et Pacis* of Grotius, which Rutherforth delivered at St. John's College, Cambridge. There were two American editions, the second appearing in 1832.

Rutherforth confined his definition of law to "a rule to which men are obliged to make their moral actions conformable." In this manner he preserves the moral content of commands. Law is then divided into two general classes: natural and voluntary. The latter, or positive law, he subdivides into divine and human. Law, thus defined and classified, is then discussed generally under the headings of those rights and obligations of mankind considered as individuals and those considered as civil societies.

His description of the institution of private property developed by the descendants of Cain in Genesis, is of interest. In the original human society all property was held in community, for there is nothing in nature that requires the recognition of private property. Nor are men forbidden to surrender their rights in common in favor of private ownership. Hence as men multiplied, lived separately and dispersed, the need for private property found no obstacle in nature. Its recognition rested upon convention; that is, upon a tacit agreement generally admitted, that individual occupancy will be respected. Thus private property, which Joseph Choate in 1895²¹⁰ described as "the very keystone of the arch upon which all civilized government rests," finds its roots in nature though not in Eden, a point to which Grotius²¹¹ and Locke²¹² lend their support.

Perhaps as influential a book as any of the great English law texts on the training of American lawyers is the *Commentaries on the Law of England*, published in 1765-1769 by Sir William Blackstone (1723-1780), Vinerian professor of law at Oxford, solicitor-general to Queen Charlotte, and later judge of the court of common pleas. American editions of the *Commentaries* appeared in 1771-1772 and continued for more than one hundred years.²¹³ According to Blackstone man as a creature of God is subject to the will of his Creator, or in other words to the law of nature discoverable by reason. This law or system of laws is universal and no civil law is valid which contravenes it. In this description of natural law the wisdom of Cicero, the organization of the Church fathers, the arguments of protestant jurists and the writings of English judges are epitomized into the

²¹⁰ *Pollock v. Farmer's Loan & Trust Co.*, 157 U. S. 429, 534 (1895).

²¹¹ *Supra* at 27.

²¹² *Supra* at 22.

²¹³ WARDEN, *THE LIFE OF BLACKSTONE* 321. The fourth edition of Colley's *Blackstone* was printed in 1899.

introduction which generations of American law students received to the study of law.

With the Roman Catholic theologians, development of natural law doctrine had primarily a religious purpose. The Christian religion is founded upon the law of God. Natural law is its rational counterpart, to which civil law must conform. As a subsidiary function natural law was useful to the Church fathers in the political disputes which arose over the conflicting jurisdictions of Church and state. With Grotius and a succeeding line of Protestant jurists, natural law supplied a basis for converting a Roman *ius gentium* into a law among nations. English jurists—who not infrequently were clerics²¹⁴—supplemented court rolls with doctrines of Roman and natural law, to broaden the base and extend the content of the common law. The chancellor drew upon them to develop equity. As with the Church fathers, so with English writers both law and clerical, natural law theory was useful in explaining political doctrine. To these English writers as to French, and more remotely to Greek and Roman, our founding fathers looked for their political creed.

REASON AND NATURE

To the long history of the natural law, reason and nature have contributed varying roles. Heraclitus began with the participation of man in the eternal order of nature. With the Stoics reason became associated with infinite wisdom and with the abiding essence of creation. A pantheistic religion developed in which the *logos*, as reason, was equated to God. During the pagan period of Roman law stoic metaphysics served to broaden the concept of a philosophical *ius gentium*, closely associated with, even if distinguished from natural law. Roman jurists drew freely upon nature and reason in creating this system of positive universal law, just as they did in expanding the *ius civile*. In Rome reason and nature found their first direct application as ingredients of positive law in the western world.

Christian legal theory could ask for no greater boon than stoic precedent of reason and nature in philosophy, and their use as a philosophical sub-stratum for Roman law. The theology of the decalogue is the law of God. His reason is supreme. The eternal law of God and the law revealed by Him as recorded in the Bible are the sources to which rational men may turn in their search for the natural order of the universe, of which by God's will man is a part. This order differs after the fall of man from its purity in the Garden of Eden. Natural law, derived by man's reason from God's law, sets the limits

²¹⁴ STEPHENS, COMMENTARIES ON THE LAWS OF ENGLAND 2 (15th ed.).

of positive law and prescribes the objectives of government. Moulded during the middle ages by the Fathers of the Church, this theory received its enduring expression in Aquinas, and today remains the orthodox creed of the Roman Catholic Church.

Protestantism and the Enlightenment, humanism and rationalism during the sixteenth, seventeenth and eighteenth centuries, broke gradually from the orthodoxy of the Church, but not at once with its theological exegesis of natural law. The emphasis, however, was different, and was directed toward the social nature of man and his reason. From these sources grew a new *ius gentium*, an international law of war and peace. From them also arose new theories of the state, sometimes patriarchal in origin, sometimes founded upon a fiction of contract. The advance of science and the greater reliance which men placed upon reason caused them to look to nature not only for the ancient roots of government, but for the rights which men could assert as standards for the good life on earth. During the Enlightenment this use of nature and of reason caused lay writers to forsake the affinity that natural law has for theology, which characterized the writings of protestant divines as well as of the Church Fathers, and to study the history of man, even of the "noble savage" in the American wilderness, in their quest for utopia. The reason and nature of Montesquieu, Rousseau or Voltaire, or even of Locke and of Thomas Paine, are not those of Aquinas or Cumberland, of Grotius, of Cicero or of Zeno. Nor was the natural law of the Enlightenment that of the Middle Ages, of the Roman jurists, or of Greece.

In England, too, reason and nature enjoyed various connotations. In the ecclesiastical courts their theological meaning prevailed in the form of natural or canon law. And as long as the chancellor was an ecclesiastic or closely affiliated with the church, he held to similar views. On this basis doctrines of equity were erected. In the political realm, however, the conception of reason and nature reflected the age in which it was used, as well as the clerical or lay predilections concerning government which were advanced. These differences are illustrated in the works of Hobbes as contrasted with Bishop Cumberland or with Locke. The theological dominance of one period yielded to the humanism or rationalism of another, but the victory of neither was complete. Similarly in law-text writing the variation in meaning is apparent, corresponding to the lay or clerical background of the writer. But especially in law the caution of Saint Germain is pertinent, that while in other countries a rule might be described as one of natural law, in England its source was attributed to reason.

Just which of these theories of reason and nature or of natural law was to become dominant in America is not now for discussion. Although the earliest English law texts had been published before the Pilgrims landed at Plymouth, their content was largely unknown to

those colonists. They began with the law of God as revealed to them in the Bible. During the next one hundred and fifty odd years, however, which intervened between Plymouth and the signing of the Declaration of Independence, the cross currents of lay and clerical writings on natural law, on natural rights and on theories of the state with which the Reformation and the Enlightenment refuted the Middle Ages, formed the complex background of legal and political theory for American lawyers and statesmen, just as they did for those in England and Europe. The confidence with which the humanists of these two centuries rationalized natural man and his law with frequent references to the noble savages of this new-found land, seems scarcely warranted either in light of the confusion which they injected into concepts of reason and nature, or natural law and natural rights, or in light of the serenity of doctrine with which the Pilgrim fathers first encountered these native Americans in their New England primeval haunts.

Basically all of these theories of reason and nature or of natural law and natural rights have one common ingredient: whether associated with orthodox Christian revelation or humanistic rationalism, they each attest to the faith of democratic man that the actual does not of necessity exclude the ideal. Law as force alone is never a satisfactory explanation of governmental power. Might and right must be united before their reign as law becomes satisfactory in a democratic sense. This is essentially the thesis of any theory of higher or natural law. In its divergent manifestations, natural law and its accompanying doctrine of rights are simply the belief of rational man in his ability to predicate the essentials of his cultural existence under good government, upon a critical analysis of his own cultural history. Modern political thought may question the sources from which these standards arise, and even the objectives which they champion, but it does not deny the fusion of the real and the ideal. It may have become skeptical regarding the easy attainment of goals, but it believes just as implicitly as formerly in man's natural rights to strive to attain them. The doctrine of man's natural dignity, of the function of government to support his ideals, and of his reasoning ability to discover ways and means to realize his potentials in civil society, whether attributed to the wisdom of Grecian philosophy, to the revelations of Hebrew-Christian theology or to scientific sociological observation, is the basic thesis of democratic government and also of natural law. In America as well as at Rome law may be *ius* as well as *lex*. — All this and much more is our natural law heritage in America.